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Federal Communications Commission
Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of Tariff Filing Requirements for Interstate Common Carriers	)	CC Docket No. 92-13

REPLY COMMENTS OF GTE SERVICE CORPORATION

GTE Service Corporation ("GTE"), on behalf of its affiliated satellite, cellular service, and telephone operating companies, hereby submits its reply comments in the above-captioned proceeding.

INTRODUCTION

On or about March 30, 1992, the Commission received initial comments in response to the notice of proposed rulemaking issued in this proceeding.[1/] Most of the commenting parties support continuation of the Commission's tariff forbearance policy, both from legal and public policy perspectives. Of those parties filing initial comments, only five parties -- The American Telephone & Telegraph Company ("AT&T"), NYNEX, U S West, Alascom, and Marine Mobile Radio, Inc. -- have argued that the Commission's tariff forbearance policy is unlawful. Supporters of tariff forbearance include many diverse interests. They include the largest non-dominant carriers,[2/] many

1/ Tariff Filing Requirements for Interstate Common Carriers (Notice of Proposed Rulemaking), 7 FCC Rcd 804 (1992) (hereinafter, "Notice").

2/ See, e.g., comments of MCI Telecommunications Corporation, Sprint Communications Company, L.P., and Williams Telecommunications Group, Inc.

smaller carriers,[3] several local exchange carriers classified as "dominant,"[4] cellular and mobile communications interests,[5] providers of alternative local exchange and access services,[6] information service providers[7] and, perhaps most importantly, users of communications services.[8]

The record in this proceeding overwhelmingly supports a conclusion that tariff forbearance for carriers not deemed to be dominant is lawful, represents sound public policy, and should be retained. As such, GTE's reply comments will be limited to responding to those comments which have challenged tariff forbearance. In addition, GTE will explain why extension of non-dominant carrier treatment to the tariff filings of certain carriers currently classified as dominant would serve the public interest in appropriate circumstances.

3/ See, e.g., joint comments of Automated Communications, Inc., Business Telecom, Inc. and U.S. Long Distance; RCI Long Distance; the Telecommunications Marketing Association; and the Interexchange Resellers Association.

4/ Comments of Pacific Telesis Group and Southwestern Bell Corporation.

5/ See, e.g., comments of Cellular Telecommunications Industry Association.

6/ See, e.g, comments of Metropolitan Fiber Systems, Inc. and Local Area Telecommunications, Inc.

7/ Comments of First Financial Management Corporation.

8/ See, e.g., comments of the Ad Hoc Telecommunications Users Committee, the International Communications Association, and the International Business Machines Corporation.

DISCUSSION

Tariff Forbearance is Lawful Notwithstanding the Objections Raised in the Initial Comments

In its initial Comments, GTE addressed in detail the pro-competitive public interest objectives which the Commission sought to achieve in forbearing from requiring non-dominant carriers to file tariffs. Those objectives have been attained. Specifically, GTE demonstrated that tariff forbearance has reduced regulatory costs and stimulated market entry, growth, and service and pricing innovation by the hundreds of firms which have been subject to tariff forbearance.

Moreover, GTE demonstrated that the Commission has ample authority within the Communications Act[9/] to implement a policy exempting certain carriers from filing tariffs. As described more fully in GTE's comments, tariff forbearance is permissible under Section 4(i) of the Act,[10/] since it furthers the Commission's statutory purposes set forth in Section 1 of the Act.[11/] Further, GTE explained why permissive tariff forbearance is an appropriate "modification" of the tariff filing requirement as expressly authorized by Section 203(b)(2).[12/]

Finally, GTE demonstrated that neither Congress nor the courts have moved to overturn the Commission's permissive tariff forbearance policy since its

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9/ 47 U.S.C. § 151 et seq. (1991).

10/ 47 U.S.C. § 154(i) (1991).

11/ 47 U.S.C. § 151 (1991).

12/ 47 U.S.C. § 203(b)(2) (1991). In addition, GTE noted that Sections 211 and 219 of the Act provide authority for common carriers to offer services pursuant to contracts rather than filed tariffs.

adoption in 1982. Neither the Supreme Court's decision in the Maislin case,[13/] nor the decision of the United States Court of Appeals for the District of Columbia Circuit in MCI Telecommunications Corporation v. FCC, 765 F.2d. 1186 (D.C. Cir. 1985), precludes continuation of tariff forbearance. Indeed, GTE showed in its Comments that Congress expressly recognized the Commission's tariff forbearance policy and gave its imprimatur to the lawfulness of that policy by its 1990 passage of the Telephone Operator Consumer Services Improvement Act. This law imposed upon certain non-dominant carriers (i.e., operator service providers) otherwise subject to tariff forbearance a requirement that they file "informational" tariffs.[14/]

Opponents of tariff forbearance, led by AT&T, argue that Section 203 of the Act requires that tariffs be filed by all common carriers and that the Commission has no discretion to adopt policies or rules that sanction or excuse violations of that requirement.[15/] Similarly, U S West asserts that Section 203 does not distinguish between dominant and non-dominant carriers. Rather, it states that the section "applies equally" to all common carriers.[16/]

While it is correct that Section 203(a) does indeed require every common carrier to file with the Commission schedules showing its charges, it is also correct that

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13/ Maislin Industries, U.S., Inc. v. Primary Steel, Inc., 110 S. Ct. 2759 (1990).

14/ Several commenters, most notably MCI, discuss in detail a decade of Congressional oversight of the Commission and passage of communications legislation since the inception of tariff forbearance. MCI appropriately concludes that Congress, throughout that period, consistently has recognized and accepted the Commission's view that it possessed the authority to adopt permissive tariff forbearance. Comments of MCI at 23-25.

15/ Comments of AT&T at 2.

16/ Comments of U S West at 4.

Section 203(b)(2) statutorily empowers the Commission to modify "any requirement made by or under the authority of this section" (i.e., the entirety of Section 203). Stated simply, the opponents of tariff forbearance stop reading Section 203 at the end of subsection (a). They disregard subsections (b) and (c).[17/] In addition, the opponents of tariff forbearance ignore the general powers bestowed upon the Commission by Section 4(i) of the Act to take such actions as are necessary to fulfill the Act's overarching purposes.[18/]

Not only does that narrow interpretation of Section 203 -- based only upon Section 203(a) -- ignore other important provisions of the Act, it would, if adopted, deprive the Commission of important statutory tools for fulfilling its public interest responsibilities. The restrictive interpretation of Section 203 offered by AT&T and U S West would place the Commission in a regulatory straitjacket. With no discretion to "modify" the tariff filing requirements by such means as permissive tariff forbearance based upon the Commission's perception of such considerations as market power, the Commission would be hindered in its ability to respond to market and technological changes which have occurred since the Act's inception.

17/ Subsection (c) provides, in relevant part, that "No carrier, unless otherwise provided or under authority of this Act, shall engage or participate in such communication unless schedules have been filed and published in accordance with the provisions of this Act and with the regulations made thereunder" (emphasis added). The underscored language expressly authorizes the Commission to permit carriers to provide service without filing tariffs.

18/ 47 U.S.C. § 154(i) (1991).

The Commission has an ongoing obligation to monitor its regulatory programs and to make adjustments in light of actual experience.[19/] This is precisely what the Commission did in adopting its policy of tariff forbearance for non-dominant carriers. Based upon an extensive record and a thorough analysis of that record, the Commission concluded in its Competitive Common Carrier proceeding[20/] that non-dominant carriers (i.e., those carriers without market power) were unable to price their services at rates that would not pass muster under the standards of Sections 201(b) and 202(a). Subsections 203(b)(2) and 203(c), along with Section 4(i), give the Commission the statutory tools it needs to make appropriate adjustments in the mechanisms for effectively regulating the services of non-dominant carriers -- notwithstanding AT&T's and U S West's disregard of those provisions.

U S West and AT&T recognize the existence of Section 203(b)(2) but state that the Court in MCI rejected the notion that that section provides a basis for tariff forbearance. U S West and AT&T incorrectly interpret the MCI decision. There, the court held only that mandatory detariffing (i.e., an attempted prohibition on tariff filings by non-dominant carriers) was not a "modification" of a requirement within the ambit of Section 203(b)(2). Rather, the court concluded that such mandatory detariffing was a "wholesale abandonment or elimination of a requirement."[21/] U S West and

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19/ Telocator Network of America v. FCC, 691 F.2d 525, 550 n. 191 (D.C. Cir. 1982); National Association of Regulatory Commissioners v. FCC, 525 F.2d. 630, 638 (D.C. Cir. 1975); Geller v. FCC, 610 F.2d. 973, 980 (D.C. Cir. 1979).

20/ Policy and Rules Concerning Rates of Competitive Common Carrier Services and Facilities Authorizations Therefor (Fourth Report and Order), 95 FCC 2d 554 (1983).

21/ MCI v. FCC, supra, 765 F.2d. at 1192.

AT&T overlook the fact that the MCI court expressly declined to address the lawfulness of permissive tariff forbearance.[22/]

Neither the MCI court nor any other court, including the U.S. Supreme Court in Maislin, ever has held that the Commission lacks the authority under the Act to forbear from requiring carriers not deemed to be dominant to file tariffs. Again, notwithstanding the comments of those parties opposed to tariff forbearance, the Maislin decision is not inconsistent with the Commission's currently-effective permissive forbearance policy for non-dominant carriers. As numerous commenters have noted, Maislin's relevance to the issues in the instant proceeding is questionable simply because it involves a different statute and a different industry.[23/]

More importantly, Maislin is not about forbearance from filing tariffs -- either permissive or mandatory. It is the Supreme Court's most recent affirmation of the "filed rate doctrine." Under that doctrine, carriers filing tariffs must charge all customers the filed rates -- and only the filed rates -- for the services offered pursuant to those tariffs. The Commission's tariff forbearance policy is not inconsistent with that doctrine. Indeed, as GTE noted in its initial comments, a United States District Court held, subsequent to Maislin, that the "filed rate doctrine" applies to all carriers filing tariffs -- even those carriers subject to forbearance but who elect to file.[24/]

As Sprint noted:

22/ Id., at 1196.

23/ See, e.g., comments of Southwestern Bell at 9, comments of Metropolitan Fiber Systems at 11, comments of Cellular Telecommunications Industry Association at 17-18.

24/ MCI Telecommunications Corporation v. TCI Mail, Inc., 772 F. Supp. 64 (D.R.I. 1991), cited in GTE's Comments at 22.

> It is one thing to allow a non-dominant carrier the option of filing tariffs. It is quite another thing for a carrier to exercise this option and to file tariffs but then charge rates which are inconsistent with its tariffed rates.[25/]

It is the latter conduct which is proscribed by Maislin, not the former. That all carriers, whether dominant or non-dominant, must charge their customers the rates contained in their tariffs -- if their services are offered pursuant to tariff -- does not encumber the Commission's authority under the Act to modify the tariff filing requirements of Section 203 in appropriate circumstances by allowing carriers to provide service on a non-tariffed basis. None of the commenters opposing the Commission's tariff forbearance policy has provided any statutory or case law authority to the contrary.

The Commission Should Extend Non-Dominant Treatment to the LECs in Competitive Markets

In its comments, Pacific Telesis recommends that the Commission extend forbearance to all market participants in competitive markets such as interstate digital special access services.[26/] According to Pacific Telesis, the failure to treat all market participants in a similar manner handicaps certain competitors and thus distorts competition in that market to the detriment of the public.[27/]

25/ Comments of Sprint at 7.

26/ Comments of Pacific Telesis at 3.

27/ Id. at 7, 9. NYNEX contends that the local exchange carriers ("LECs") must be allowed to operate on an equal footing in those segments of the local exchange carrier marketplace in which the LECs face competition. Comments of NYNEX at 13. However, NYNEX goes on to argue that all common carriers should be required to meet the minimum filing requirements of Section 203 of the Act. Id. As discussed herein, GTE agrees that the LECs should be accorded the same treatment as non-

(continued...)

GTE concurs with the basic principles advanced by Pacific Telesis in its comments. Competition in the provision of certain access services has increased dramatically since 1984. Competitive access providers today offer many services using microwave or fiber-based technologies that can substitute entirely for certain of the LECs' access offerings. However, the Commission's regulatory policies, including the classification of LECs as dominant carriers, restrain the LECs from responding effectively to these competitive challenges.[28/] Such restraints in turn work to the detriment of the public, since they handicap the LECs in their ability to provide new and different service options to customers. Since competition exists in the market for certain access services, all market participants, including the LECs, must be given the opportunity to compete in these markets on a fair and equal basis. If the Commission continues to hinder the LECs in their attempts to respond to competition in the access marketplace, the public will never realize all the benefits of the Commission's pro-competitive policies.

CONCLUSION

For the reasons set forth in these reply comments and in GTE's initial comments in this proceeding, the Commission should conclude that its policy of tariff

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27/ (...continued)
dominant carriers in competitive markets. However, GTE does not agree that the Commission should impose tariff filing requirements on all carriers. The Commission has the legal authority to forbear from requiring carriers to file tariffs. Furthermore, the Commission's forbearance policy has been shown to serve the public interest.

28/ In a similar vein, the Commission's existing policies regarding switched access transport services -- i.e., continuation of the "equal charge" rules -- hinder the ability of the LECs to compete. See Reply Comments of GTE Service Corporation in In re MTS and WATS Market Structure, CC Docket No. 78-72, Phase I, filed March 22, 1991.

forbearance is lawful, serves the public interest, and should be continued. Further, non-dominant carrier treatment should be applied to certain services of the LECs that are subject to competition.

Respectfully submitted,

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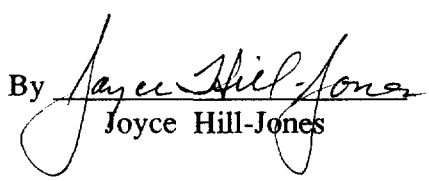
CERTIFICATE OF SERVICE

I, Joyce Hill-Jones, hereby certify that copies of the foregoing "GTE's Reply Comments" have been mailed by first class United States mail, postage prepaid on the 29th day of April, 1992, to the following parties of record.

By 
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Docket 92-13
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